

JERSEY / JUDGMENT

Captain Malcolm Le Moignan v Aurigny Air Services Limited

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Jersey Employment Tribunal INTERIM HEARING 1/08 Case Number: 2202-044/07 Applicant: Captain Malcolm Le Moignan Respondent: Aurigny Air Services Limited Hearing on 5th February 2008 Before: Mr David Le Quesne, Chairman Mrs Kelly Flageul Mr Samuel Le Breton Representation: For Applicant: Mr Le Moignan represented himself For Respondent: Advocate Mark Temple, Ozannes Mr Steven Wauchope represented Aurigny 1 The background circumstances to this application are described in the decision of the Tribunal dated 19th July 2007, and we adopt them and repeat as few of them as we can. Mr Le Moignan was employed by a contract dated 1st June 2005 as a pilot for Shorts 360 aircraft. The employer was Aurigny. In February 2006 Mr Le Moignan had to stop flying due to a medical condition which caused him to lose his required medical certificate. For the first three months Mr Le Moignan was paid full salary and for the second he was paid half his salary, as stipulated in his written contract. It was not until November 2006 that Mr Le Moignan's medical certificate was restored, so that he could fly again. 2 The hearing referred to above was on 1st July 2007 before the deputy chairman. Its purpose was to decide a preliminary point, which was whether Mr Le Moignan's employment was terminated by a letter dated 19th August 2006 from Mr David Rice, Aurigny's flight operations director, who gave evidence at this hearing. The decision of the Tribunal was as follows: "Paragraph 7. Accordingly, the Tribunal accepts Mr Le Moignan's position that he believed that he was still employed under his original Contract when he returned to work for the Respondent on the 21st November 2006 flying Shorts 360 aircraft. Paragraph 8. I find that Captain Le Moignan's contract of employment dated 1st June 2005 was not terminated by the Respondent.....and it was not unreasonable for Captain Le Moignan to consider himself still employed under such contract of employment when he returned to work on the 21st November 2006. No findings are made regarding whether such contract was varied by the Respondent at the time Captain Le Moignan returned to work as no evidence was heard on this matter..." 3 We cannot go behind this decision, and Mr Wauchope did not ask us to do so, but we have to be careful to identify precisely what are the findings made on that occasion. They are:

- (i) When Mr Le Moignan returned to work on 21st November 2006, he believed that it was under the 1st June 2005 contract of employment. (ii) As a matter of fact, when Mr Le Moignan returned to work on 21st November 2006, that contract of employment had not been terminated. (iii) Thus, the decision was that what Mr Le Moignan believed on that date, and what was the factual position, were the same. Further, we cannot permit any suggestion that, at the point of returning to work, the 1st June 2005 contract of employment had been

varied, although we may consider whether this subsequently happened. 4 The questions which we have to consider in order to decide this case are:

- (i) What were the contractual terms of Mr Le Moignan's employment once he had returned to work on 21st November 2006. We know what they were on his return to work, so another way of putting the question is 'did those original terms change, and if so how and when'. (ii) Was Mr Le Moignan given notice of termination of employment, and if so, when. (iii) Has Mr Le Moignan's employment terminated, and if so, when. 5 Towards the end of the hearing, the parties agreed that the possible answers to the question of whether or not, and when, Mr Le Moignan's employment was terminated were:
- (i) 30th October 2006, the date of a conversation between Mr Le Moignan and Mr Rice; (ii) 31st December 2006, when the Shorts aircraft which Mr Le Moignan could pilot was taken out of service and his last day of duty on the roster; (iii) 9th January 2007, the date on which Mr Rice last communicated in writing to Mr Le Moignan, stating "I agreed to give you some work on a freelance basis until the Shorts departed on 31 December. Regrettably, the Shorts has indeed now departed and I no longer have any suitable work to offer you." (iv) Never. His employment has not been terminated, and will continue until his 65th birthday on 27th February 2008. 6 The written contract of employment provided, amongst many other matters, that Mr Le Moignan's retirement age was 65 years, his job title was Shorts 360 Captain, and three months written notice of termination was required by the party terminating. 7 The convenient way to approach this difficult case is first to consider each of the possible termination dates as described in the paragraph 5. 8 30th October 2006. On this day, Mr Le Moignan was in Guernsey to see the Civil Aviation Authority approved doctor for tests to determine whether or not he was fit to return to work. He called in without an appointment to see Mr Rice, and, quoting from Mr Le Moignan's written statement appended to his JET1 form "He told me he could only offer me part time employment, as my position had been taken. Bearing in mind that I was on my way to have an ECG in an hour or so, I kept calm and did not enter into any discussion about my status, knowing full well he was wrong." Words like this, without more, would not be sufficient to terminate Mr Le Moignan's contract of employment, or vary it. In saying this, we recall what the Tribunal said in another case, referred to us by Mr Wauchope, Almeida v The Steak House Restaurant, which was "An important event like dismissal or the giving of notice should be in writing, not just because the employee may not understand, but also because shocking or surprising events sometime do not sink in, or the details quickly leave the mind." Writing is not necessary, but dismissal must be done clearly, so that there can be no doubt in the recipient's mind as to what has happened. Had this been intended to be a dismissal, it should at the very least have been followed promptly by a written confirmation; it was not. The Respondent's position is understandable in the light of its belief that it had already terminated Mr Le Moignan's employment on 19th August, but the Tribunal under the deputy chairman has found that not to be the case, so we are looking at what happened on 30th October in its own light, rather than in the light of something that happened on 19th August. 9 31st December 2006. The last day on which Mr Le Moignan worked for Aurigny, according

to the printed crew roster. We do not regard that as significant. It is also the day on which Aurigny's Shorts 360 aircraft ceased to be operational. Mr Le Moignan was not qualified to fly any other of Aurigny's aircraft. It is suggested by the Respondent that this may be the date of termination of Mr Le Moignan's employment because it was a term of his contract that he would only be employed whilst Aurigny had a Shorts 360 for him to pilot. The defect in this argument is that this was not a term of Mr Le Moignan's written contract, as we know from the previous decision of the Tribunal that up to 21st November 2006 the written contract was operative. If a term making his employment conditional upon Aurigny having that aircraft was subsequently incorporated into the contract of employment, when and how did that come about? There is no evidence brought by Aurigny which is sufficient to discharge the burden of proof on it of satisfying us that the contract which has been found to have existed on 21st November 2006 (i.e. the written contract) was varied after that date. Had such an important change been made, we would have expected Aurigny, as the employer, to have some form of note to that effect, if not a memorandum signed by it and Mr Le Moignan. 10 9th January 2007. This is the date of the email from Mr Rice to Mr Le Moignan the relevant parts of which have been quoted in paragraph 5 above. In considering this letter, it must be borne in mind that Mr Rice believed, we now know wrongly, that he already had given notice to Mr Le Moignan. The question for us is whether this, in all the circumstances, was sufficient to amount to notice of termination. We find that it was. The words "I no longer have any suitable work to offer you" are fairly clear. We also bear in mind (a) Mr Le Moignan's evidence which showed that he believed or apprehended that his employment with Aurigny would not last beyond the departure of the aircraft which he was able to fly, and (b) the fact that Mr Le Moignan had not been rostered for duty since 31st December 2006. The combination of the words used and what was in Mr Le Moignan's mind lead us to the conclusion that he understood that this communication was notice of termination of employment. Our decision therefore is that Mr Le Moignan was given the contractual notice to which he was entitled, three months, by this email on 9th January 2007. 11 This decision means that we reject Mr Le Moignan's submission that he was never given notice, and that he remains employed by Aurigny, or so remained until relatively recently. 12 Mr Wauchope submitted that the defence of estoppel is available to Aurigny. Estoppel is a legal principle which is available to a party defending a claim (the saying is 'estoppel is a shield, not a sword'). In simple terms,

- (a) if Aurigny acted to its detriment in reliance upon something said or done, or even something not said or not done by Mr Le Moignan
- (b) in circumstances where there was a duty upon Mr Le Moignan either not to have said or done it, or (in the case of omission to say or do something) to have said or done something,
- (c) Mr Le Moignan would not be able to base a claim upon what Aurigny did, or failed to do
- (d) because it would be unfair for Mr Le Moignan to benefit from what Aurigny did as a result of a misrepresentation by him. In even simpler terms, the principle of estoppel is that it would be unfair to allow A to complain about what B has done if A caused/induced B to do the act.

The underlying basis of all equitable estoppel (which is what Mr Wauchope relies upon) is that it must be unconscionable to allow the party estopped to deny what which he had allowed the other party to assume to be true. Lord Wilberforce said in *Moorgate Mercantile Co Ltd* “...the duty necessary to found an estoppel by silence or acquiescence arises where ‘a reasonable man would expect’ the person against whom the estoppel is raised ‘acting honestly and responsibly’ to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations.” Mr Wauchope says that Mr Le Moignan knew from 19th August 2006 that Aurigny intended to terminate his contract, albeit Aurigny’s apparent attempt at termination was ineffective, as found by the previous Tribunal. Thereafter, knowing that Aurigny believed that it had terminated his employment, Mr Le Moignan did not clarify the matter with Aurigny, but allowed Aurigny to remain under its misapprehension, so that Aurigny did not subsequently take proper steps to terminate the employment and therefore Mr Le Moignan remained as an employee longer than otherwise would have been the case, to the detriment of Aurigny. 13 We have Mr Le Moignan’s letter to Mr Rice of 23rd August 2006 stating “....however I do believe we need a definitive answer [as to his medical fitness to return to work] before my contract can be terminated, which I hope to get soon.” Aurigny did not reply to this clear statement by Mr Le Moignan that he did not think that his employment could be or had been terminated. In the light of this letter, Aurigny cannot complain that Mr Le Moignan did not make it clear that he did not accept his dismissal. Upon receipt of this letter, it was incumbent on Aurigny, not Mr Le Moignan, to sort out the disagreement. 14 Further, in our opinion Mr Le Moignan could not bring the true facts to the attention of Aurigny when he, himself, did not know the true facts. He thought that Aurigny could not dismiss him in the way it had, but he did not know the true position until the Tribunal decision. Mr Le Moignan said that he did not know in what capacity he was working for Aurigny, once his medical certificate was regained and he was again working full shifts for Aurigny. He had good reason to believe that he still was employed under his contract of employment:

- (i) the employee who organised the duty rosters said that he was needed full time, (ii) Aurigny paid both employer and employee social security contributions (iii) the Christmas roster showed that Mr Le Moignan was given holiday on 26th December 2006 as “lieu day for 25th December”, which would not have happened to a freelance. These factors, and Mr Le Moignan’s evidence that “I did not know where I stood” lead us to conclude that Mr Le Moignan did not have enough knowledge or certainty about his position to be able to know if Aurigny was under a misapprehension or to be able to correct it. You cannot correct somebody if you do not know what is the correct position. 15 Mr Le Moignan’s conduct was not unconscionable. We would go further and say that we would find it difficult to accept that there is a duty upon an employee, in circumstances such as these, to explain to the employer why as a matter of the employment law or the employment contract, the employer’s attempt to give notice is invalid. 16 In addition, just as it is difficult to know what Mr Le Moignan thought was his employment situation, so it is difficult for us, and would have been difficult for Mr Le Moignan at the time, to know what Aurigny believed. Mr Rice’s

evidence was that Mr Le Moignan's employment automatically came to an end once he remained off work due to sickness for more than six months; he said this was company policy. Clearly, according to the contract, this was not the case. Further, this evidence is inconsistent with Mr Rice's statement before the deputy chairman, paragraph 6, in which he said that in a conversation with Mr Le Moignan in August 2006 "I made no reference to 3 months notice because I had agreed with him on the telephone that his employment would terminate at that point because he had exceeded the six months pay period". If the employment automatically terminated after the six months, as Mr Rice told us, he would not have needed to agree immediate termination as he said in his statement. 17 We therefore reject the submission on behalf of Aurigny that it is protected by estoppel, for the reasons we have given. 18 Mr Le Moignan claims that he was unfairly dismissed. This was a case of dismissal because of redundancy arising from the circumstance that Mr Le Moignan was only allowed to fly the Shorts aircraft, and when it ceased to be operational there was no job for him. Few of the procedures which should be followed when considering and implementing redundancy were followed by Aurigny, but failure to follow procedures is not necessarily fatal. The determining factor in this case is the evidence of Mr Le Moignan that he accepted that he was going to lose his job when the Shorts ceased to be operational. He accepted that it would not be practical for Aurigny to go to the considerable expense of retraining him to fly the replacement when he was so close to retirement age. The only possible alternative suggested to us was that he would continue to be employed by Aurigny, but, in effect, sub-contracted to other airlines operating the sort of aircraft which he could fly. We felt that this was not put forward as a truly practical alternative to redundancy, not least because it is difficult to see why Aurigny should want to do this. We therefore reject Mr Le Moignan's claim that he was unfairly dismissed. The circumstances leading us to this conclusion are unusual. The serious failure by Aurigny to follow appropriate procedures is counterbalanced, in this case, by Mr Le Moignan's frank admission in evidence that he recognized the reality facing him and Aurigny. 19 Much of the difficulty with this case arises from Aurigny's approach to its duties as an employer. No notes or records were kept. Mr Rice told us that, as far as he was concerned, Mr Le Moignan's employment automatically came to an end after he had been off sick for six months; that the contract automatically lapsed. When it was pointed out to him that this was not a term in the written contract, he told us that this understanding was based on what the finance department had told him. Doubtless Aurigny has greatly improved its approach to employment matters, but it is worth making the point that the keeping of records can lead to the avoidance of doubt and the avoidance of the Tribunal having to decide between two conflicting stories. It is very much in the employer's interests to keep accurate, contemporaneous records and notes. 20 We have not heard evidence on the financial and other consequences of the termination of Mr Le Moignan's employment, for we thought it sensible first to establish the fact and date of termination. Having established that date, we now will move on to that final stage, unless the parties reach an agreement in the meantime. The secretary to the Tribunal will fix a date for a directions hearing which will lead to a full hearing before the same Tribunal. David Le Quesne, chairman. 8th February 2008.

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